Supreme Court, U.S.
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No. 96-1897

In the Supreme Court of the United States

October Term, 1996

MID-SOUTH CONTROLS & SERVICES, INC.,
Petitioner,

v.

EARL J. HEBERT, JR.,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court and the Court of Appeal, Third Circuit, State of Louisiana

PETITIONER'S REPLY

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v.
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PETITIONER'S REPLY

Petitioner, Mid South Controls and Services, Inc., respectfully submits its Reply in response to the Opposition filed by Respondent, Earl J. Hebert, Jr.

Respondent argues that this Court should not grant a writ in this case for two main reasons. Respondent first claims that there is no conflict between federal and state worker's compensation law because the Louisiana Supreme Court in *Sampson v Wendy's Management, Inc.*, 593 So.2d 336 (La. 1992), allegedly construed La. R.S. 23:1361, the retaliatory discharge section of the Louisiana's Worker Compensation law, as "a delictual employment law matter... rather than a worker's compensation matter." Opposition at p. 5. As such, respondent argues, he should be able to entertain his state law worker's compensation retaliatory discharge claims in state court, despite prior settlement of all of his LHWCA claims. This circuitous argument fails, for several reasons, discussed *infra.*

First of all, there is a serious question, after recent amendments to La. R.S. 23:1310.3, on which the *Sampson* Court relied, whether *Sampson* is still good law. Second, the Court in *Sampson* was not dealing with a federal preemption issue, the question was whether the state Office of Worker's

Compensation had exclusive jurisdiction over retaliatory discharge claims brought under the Louisiana Worker's Compensation Act. In this case, the issue is whether the Federal Act, the LHWCA, which also contains a retaliatory discharge provision, preempts Louisiana retaliatory discharge claims. The Federal Courts hold that the LHWCA, through OCSLA, does in fact preempt the Louisiana retaliatory discharge provision where OCS workers are concerned, and that exclusive jurisdiction to hear such claims is vested in the federal tribunals. See, *LeSassier v Chevron*, 776 F.2d 506 (5th Cir. 1985).

Furthermore, as evidenced by later Fifth Circuit cases, federal preemption may apply whether or not the state statute at issue involves a state worker's compensation claim: The preemption applies to all liability arising from the employment relationship. Such liability arising from the employment relationship includes not only wrongful discharge claims, as set forth in *LeSassier*, but other claims, including tort claims arising from the employment relationship. See. e.g., *Hetzel v Bethlehem Steel Corp.*, 1996 A.M.C. 1211, 32 Fed.R.Serv.3d 400 (5th Cir. 1995). Therein, an OCS worker who had filed for benefits under the LHWCA brought a separate diversity claim against his employer under the Texas Deceptive Trade Practices Act. The Fifth Circuit concluded that the tort suit was preempted, because the LHWCA provided the worker's sole remedy.

Accordingly, under federal decisions, whether or not Hebert's wrongful discharge claims are classified as a tort rather than a worker's compensation matter under the Louisiana Court's decision in *Sampson*, they still "arise as a result of the employment relationship" and are preempted by federal worker's compensation law, which provides an employee's "exclusive remedy" against his employer.

Hebert urges that this Court is bound by the Louisiana Supreme Court's decisions interpreting Louisiana laws. However, it is well settled that the issue whether the federal

LHWCA applies to preempt plaintiff's state law claim is a question of federal, and not state law. *Davidson v. Enstar Corp.*, 848 F.2d 574, *on rehearing* 860 F.2d 167, *rehearing denied* 864 F.2d 791 (5th Cir. 1988). State courts are bound by federal decisions on the subject. *Id.*, See also, *Byrd v. New York Central System*, 70 A.2d 97, 6 N.J.Super. 568 (N.J.Co.1949) *Standard Wholesale Phosphate & Acid Works v. Rukert Terminals Corp.*, 65 A.2d 304, 193 Md. 20 (Md.1949).

To the extent that the state court's decisions in the instant case and in *Sampson, supra,* permit an independent state court action for retaliatory discharge after settlement of all of an OCS worker's LHWCA claims, those decisions are in direct conflict with federal law and with federal decisions interpreting the LHWCA, presenting an issue of extreme import which this Court should resolve.

Second, respondent urges that this court cannot issue a writ to consider whether the state court erred in failing to apply the federal law of res judicata in this case, because petitioner allegedly raised this issue for the first time before this Court. This argument is baseless. Petitioner raised the issue of res judicata by exception, and the issue was in fact ruled upon by the trial court and the court of appeal. Furthermore, petitioner quotes verbatim from its application to the Louisiana Supreme Court:

> In this case, the courts were asked to determine the preclusive effect of a judicially approved settlement rendered by a federal tribunal exercising federal question jurisdiction. When a state court is required to determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction, the federal law of res judicata must be applied. *Reeder v. Succession of Palmer*, 623 So.2d 1268, 1271 (La. 1993) *cert. denied* --- U.S. ----, 114 S.Ct. 1191, 127 L.Ed.2d 541 (1994), citing *Commercial Box & Lumber Co. v. Uniroyal, Inc.*, 623 F.2d 371, 373 (5th Cir.1980).... See

also *James Tye v. Co-Mar Offshore Operators, Inc.*, 95 0094 (La.App. 1 Cir. 10/6/95), 1995 WL 588277 (when a state court considers the preclusive effect of a federal court judgment based on federal question jurisdiction, the court must apply the federal law of res judicata). (Application at p. 15.)

As such, respondent's contention that petitioner did not argue for application of the federal law of res judicata in the courts below is groundless.

CONCLUSION

The decision of the Louisiana state court permitting an outer Continental Shelf worker who has recovered from his employer under the Longshore and Harbor Worker's Compensation Act to maintain a state law compensation action for retaliatory discharge is directly contrary to federal law, including the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333; the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a), federal Fifth Circuit jurisprudence directly on point, including *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir.1985) and *Hetzel v Bethlehem Steel Corp.*, 50 F.3d 360, 1996 A.M.C. 1211, 32 Fed.R.Serv.3d 400 (5th Cir. 1995), and congressional policy underlying the LHWCA.

Moreover, the decision of the Louisiana state court refusing to hold that the ALJ approved settlement of the LHWCA claims barred additional worker's compensation claims under the doctrine of *res judicata* is directly contrary to the federal law of *res judicata*, which must be applied in a case where the effect of a prior federal judgment is at issue.

As this Court noted in *Braxton v. U.S.*, 111 S.Ct. 1854, 500 U.S. 344, 114 L.Ed.2d 385 (1991), a principal purpose for which this Court uses its certiorari jurisdiction is to resolve conflicts among the circuit courts of appeals and state courts concerning the meaning of provisions of federal law. This case demonstrates that the state courts in Louisiana and the federal Fifth Circuit are in direct conflict over the

exclusivity provisions and the preemptive effect of the LHWCA in outer Continental Shelf cases, to the grave detriment of all Louisiana employers who provide benefits to their employees under the LHWCA.

Accordingly, petitioner Mid South Controls and Services, Inc., respectfully submits that a writ should issue to review the decision of the Louisiana Third Circuit Court of Appeal, and that, after due proceedings had, the decision should be reversed.

Respectfully submitted,

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